IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 21216 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
AND
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MARUTI TRAVELS THRO' PROPRIETOR JAGDISH BAROT - Petitioner(s)
Versus
NUCLEAR POWER CORPORATION OF INDIA & 2 - Respondent(s)

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Appearance :
DR MUKUL SINHA for Petitioner(s) : 1,
MR JD AJMERA for Respondent(s) : 1 - 2.
MR BHARGAV HASURKAR for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE K.A.PUJ

Date : 30/08/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

In this petition under Article 226 of the Constitution, the petitioner has challenged the decision of respondent No.1 Nuclear Power Corporation of India to award the contract to M/s. Jaydev Barot (respondent No.3 herein) for hiring and running of different types of brand new vehicles on contract basis for a period of three years from 01.09.2007 for its Kakrapar Atomic Power Station.

2. By tender notice, the respondent Corporation had invited sealed tenders for the above contract. The tenders were opened on 14.06.2007. Five sealed tenders were received within the stipulated time including the tender submitted by the petitioner and also the tender submitted by respondent No.3 herein. The rates quoted by above five parties against the estimated rate of Rs.1,90,84,752/- (Rupees one crore ninety lacs eighty four thousand seven hundred fifty two only) at the rate of Rs.5,30,132/- p.m. (Rupees five lacs thirty thousand one hundred thirty two only) are as under:-

Sr. No.	Name of Parties	Quoted rate for three years Rs.	Grading
1	M/s. Jaydev B. Barot Mehsana (Respondent No.3)	1,68,15,600/-	L1
2	M/s. Maruti Travels Ahmedabad (Petitioner)	1,68,84,000/-	L2
3	M/s. Shree Arbuda Roadlines Mehsana	1,81,58,400/-	L3
4	M/s. Geos Enterprises Ahmedabad.	1,83,38,400/-	L4
5	M/s. Shah Travels, Vadodara.	1,86,25,860/-	L5

3. However, at the time of opening of the tenders on 14.06.2007, the Assistant Manager (Finance and Accounts) who examined the tender of respondent No.3 observed that the tender submitted by respondent No.3 was not valid as there was conditional rebate offered by pencil writing in column No.7 in Annexure-2. In view of the said observation, the Tender Opening Committee consisting of Deputy General Manager (HR), Senior Manager (HR) and the Assistant Manager (Finance and Accounts) prima facie rejected the tender of respondent No.3 on the same day. Ultimately, the Station Director of the respondent Corporation constituted a Committee on 30.06.2007 consisting of five officers, Senior Engineer (MM & G) – Chairman, Deputy General Manager (HR), Deputy Vigilance Officer (DVO), Deputy General Manager (Finance and Accounts) and Senior Manager (C & MM) as members. The Committee deliberated in detail and observed that the portion written in pencil mark is to be understood “null and void” and as such the tender cannot be rejected on that ground. While taking this decision, the Committee also consulted the head quarters of the respondent Corporation at Mumbai. The above Committee accordingly recommended to consider the tender of respondent No.3 also. In view of inclusion of respondent No.3 in the zone of consideration, the comparative statement was prepared afresh and offer made by respondent No.3 was found to be lowest. The respondent Corporation also took into consideration that apart

from the rates quoted by respondent No.3 being marginally lower than the rates quoted by the petitioner, there were following significant differences in the offers made by the parties tilting the balance in favour of respondent No.3:-

	Petitioner	**Respondent No.3**
Additional Charge, if any, for out State running.	Rs.200/- per day	NIL
Any other condition/remarks	Rs.200/- per night halt charges for out station duty.	NIL
Km. Rate for using Indica with AC	Rs.10/- per km.	NIL
Status of the party	L2	L1

4. Since the original tender of respondent No.3 had indicated the rate for A.C. Car as “00”, respondent No.3 was called personally for clarification and respondent No.3 stated in his clarification dated 23.07.2007 that the rate for A.C. Car would be the same as the rate for the Non-A.C. Car in other words – no additional charge. Respondent No.3 also submitted that he was prepared to offer overall rebate of Rs.12,100/- i.e. 2.59% of approximate on the minimum guaranteed amount of Rs.4,67,100/- per month. This clarification and offer were made in the communication dated 23.07.2007. On the basis of the above, the competent authority decided to award the contract to respondent No.3 and issued letter of intent on 28.07.2007.

5. It is the case of respondent No.3 that after receiving the letter of intent, respondent No.3 started making arrangements for purchasing new vehicles by taking loans and by the time respondent No.3 was served with the notice of this petition, respondent No.3 has already invested Rs.75 lacs.

6. The petition came to be filed on 16.08.2007. In response to the notice, affidavits-in-reply have been filed on behalf of the respondent Corporation and also by respondent No.3. The stand of respondent Corporation is that right from day one, the rates quoted by respondent No.3 were the lowest, but it was only because the Tender Opening Committee took the prima facie view that the tender submitted by respondent No.3 was invalid on account of pencil entry in column No.7 that the tender of respondent No.3 was treated as invalid. However, the higher authorities especially, the competent authority on the advice and recommendation of the five member Committee took the view that pencil entry was required to be ignored as null and void and that there was no justification for keeping respondent No.3 out of the zone of consideration particularly, when his rates were lowest. The comparative statement is also produced to show that apart from the lowest rates quoted by respondent No.3, in many other respects such as charges for air conditioned car night halt charges for drivers and outstation running, respondent No.3 had offered not to levy any charge as against the charges proposed to be levied by the

petitioner.

7. Dr. Mukul Sinha, learned counsel appearing for the petitioner has submitted that since the tender of respondent No.3 was considered as invalid and the rates quoted by him were not read out before the other tenderers on 14.06.2007, the respondent – Corporation could not have taken the subsequent decision to consider the tender of respondent No.3 as valid and eligible and could not have called respondent No.3 for further negotiations without giving similar opportunity to the petitioner.

8. Mr. Ajmera for respondent Nos.1 and 2 and Mr. Hasurkar for respondent No.3 have opposed the petition.

9. As far as the question of validity of the tender of respondent No.3 is concerned, the petitioner had no right to be called for any hearing before the competent authority which took the decision that the tender of respondent No.3 should be considered as valid.

10. As regards the opportunity for reducing the rate, once respondent No.3 was considered to be eligible and the rates originally quoted by him were found to be lowest, the petitioner as the L2 tenderer had no right to be called for negotiations. It would be a different matter altogether if the Corporation were to call all

the eligible tenderers for negotiations, in which case also, the decision would not have been illegal. But in the facts and circumstances of the case, the decision to call only the lowest bidder (L1) for negotiations cannot be treated as arbitrary.

11. It may be that the Assistant Manager who opened the tender of respondent No.3 and declared that tender of respondent No.3 was not valid, did not read out the rates quoted by respondent No.3 on the date of opening the tender on 14.06.2007; that by itself cannot vitiate the entire decision making process. Apart from the fact that the tender of respondent No.3, as already submitted on 13.06.2007 and opened on 14.06.2007, did make him the lowest party as from the figures given in Paragraph 4.5 of the affidavit-in-reply, the further fact that respondent No.3 had agreed not to levy any extra charge for running air conditioned cars for night halts and for plying outside the State would obviously tilt the balance in favour of respondent No.3. This offer not to charge anything extra for the air conditioned car was also already disclosed in the document dated 13.06.2007. The only reason why respondent No.3 was called was just to confirm whether “00” figure against use of air conditioned car was meant to convey that respondent No.3 would not charge anything extra for running A.C. Cars and the same was clarified on 23.07.2007. It was at that meeting that respondent No.3 made a further offer to lower his offer which was already L1.

12. We may now examine the merits of the contention that tender of respondent No.3 was required to be treated as invalid, as was the prima-facie view taken by the Tender Opening Committee, on the ground that the tender of respondent No.3 was a conditional one. Reliance is placed by the petitioner on Note 3 to the tender document, which read as under:-

> "Tenders with any condition including conditional rebates shall be rejected forthwith."

The condition which respondent No.3 had indicated against column No.7 "Any other condition/remarks" was as under:-

> "Negotiable with terms and conditions as follows with KAPS (Kakarapar Atomic Power Station) 0.5% is negotiable, if it is required."

Strictly speaking this was not a condition but a rebate offered by respondent No.3. It cannot be treated as a conditional rebate because the rebate offered was not dependent on any condition or contingency. The Committee of five officers appointed by the competent authority i.e. the Station Director took the view that the condition was required to be ignored as null and void. Even assuming that two views were possible on this question, the decision of the respondent-Corporation not to treat the tender of respondent No.3 as invalid cannot be stigmatized as perverse or unreasonable, unfair or malafide.

13. We may at this stage note the principles enunciated by the Hon'ble Supreme Court which are required to be applied in such cases.

In *M/s. G.J. Fernandez Vs. State of Karnataka, AIR 1990 Supreme Court 958*, the Apex Court held as under:-

> "It is true that the relaxation of the time schedule in the case of one party does affect even a person like the appellant in the sense that he would otherwise have had one competitor less. But, the rule of invalidation of a grant on account of deviation from professed standard will be readily applied by Courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before Court is only to gain immunity from competition."
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> (emphasis supplied)

Again in *B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd., (2006)11 SCC 548*, the Apex Court has laid down the following important principle:-

> "**69.** While saying so, however, we would like to observe that having regard to the fact that huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it. It may be true that essential terms of the contract were required to be fulfilled. If a party failed and/or neglected to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the

> rate quoted by others. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction."

14. Applying the aforesaid principles to the facts of the present case, it is very clear that the petitioner is interested in getting respondent No.3 out of competition because without respondent No.3, the petitioner's bid would have been the lowest. But once the tender of respondent No.3 is considered as valid, it is respondent No3 whose bid is the lowest. The decision of the respondent Corporation is thus in the interest of public exchequer and if the Corporation had accepted the objection of the petitioner, as raised in the letter dated 24.7.2007, that would have been against the interest of the public exchequer.

15. We may also refer to the two decisions cited by the learned counsel for the petitioner in support of his contentions :-

In *WB State Electricity Board vs. Patel Engineering Co. Ltd., 2001 (2) SCC 451*, the Apex Court held that mistakes/errors committed by a party while submitting the tender cannot be permitted to be corrected. The Court held that in international competitive bidding, which postulates keen competition and high efficiency, the degree of care required is greater than in ordinary local bids for small works and that adherence to the instructions in the tender documents cannot be given a go-by by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism. It was also observed therein that where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules.

Apart from the fact that the present case is not a case of international competitive bidding but merely a case of awarding contract for providing vehicles on hire to a public Corporation, the competent authority of the respondent-Corporation has treated the writing made by respondent No.3 against column No.7 “any condition/remarks” as not making the tender a conditional one and, therefore, there is no question of respondent No.3 having been permitted to correct a mistake/error. On the contrary, the case is squarely covered by the ratio of the decision in B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd (2006)11 SCC 548 quoted

hereinabove.

16. The learned counsel for the petitioner has also relied on the decision in *Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation & Ors., 2000 (5) SCC 287*. That was a case where tenderer M did not satisfy a particular condition of the tender at the time of submitting the tender and the Municipal Corporation subsequently deleted that particular condition and awarded the contract to that party M. The High Court set aside the award of contract in favour of M and the Apex Court confirmed that decision, because if a term of the tender was deleted after the players entered into the arena, it was like changing the rules of the game after it had begun and that M who was ineligible at the time of submitting the tender could not have been made eligible by deleting a particular condition subsequent to the last date of acceptance of the tender. The High Court and the Apex Court held that in such circumstances, the only permissible course was to go in for fresh process of tender.

The facts of the present case are entirely different. The decision has no applicability to the facts of the present case.

17. Apart from this aspect since respondent No.3 was given the letter of intent on 28.07.2007, he has made arrangements for

purchasing vehicles and he went to the respondent Corporation to send their officers for inspection on 28.07.2007 is an additional fact which has weighed with this Court for dismissing this petition.

18. In view of the above discussion, the petition is dismissed.

Notice is discharged.

[M.S.SHAH, J.]

[K.A.PUJ, J.]

mrpandya*